Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

YIGAL BOSCH, on behalf of himself
and all others similarly situated,

Petitioner,

v.

CRESTAR BANK and its successor in interest Fleet Bank,
FLEET CREDIT CARD SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS (HOUSTON) AND THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT ERRED IN INTERPRETING THE TERMS OF THE AGREEMENT IN CONFLICT WITH AN INTERPRETATION OF THE NINTH COURT OF APPEALS AND THE COURT OF APPEALS OF THE THIRD CIRCUIT.

II WHETHER THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS (HOUSTON) AND THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT ERRED IN DISMISSING THE PETITIONER'S COMPLAINT AND ALLOW SANCTIONS AGAINST HIM BY REFUSING THE PETITIONER HIS RIGHT OF A JURY TRIAL AND DUE PROCESS IN VIOLATION OF THE UNITED STATES CONSTITUTION ON THE ISSUE OF THE VALIDITY OF A CREDIT CARD HOLDER AGREEMENT WITH A SUBSEQUENT LENDER WHICH REFUSES TO ABIDE BY THE TERMS OF THE ORIGINAL AGREEMENT AND CAUSING SERIOUS HARM TO THE PETITIONER AND TO THE PUBLIC?

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OPINIONS BELOW

The decision of the United States Court of Appeals Fifth Circuit dated January 9, 2002 affirming the District Court's Decision dismissing the Petitioner's complaint is set forth in the Appendix, p. 1a. The decision of the United States District Court-Southern District of Texas granting the Respondents' Motion for Summary Judgment is set forth in the Appendix, p. 10a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals Fifth Circuit affirmed the District Court's decision granting the Respondents' Motion for Summary Judgment. This Petition was timely filed within the prescribed period.

CONFLICT WITH OTHER COURTS DECISIONS

In **DeMando v. Morris, 206 F.3d 1300(9th Cir. 2000)** The issuer sought to raise the rate under "change-in-terms clause in the applicable agreement. The court found that the attempt to raise the rate violated the terms of the agreement, insofar as it promised a permanent fixed rate. Under those facts, the original disclosure, which promised a fixed rate, accurately reflected the terms of the underlying agreement at the time they were made. **Id. at 1302-03.**

The ninth Circuit concluded that the notice announcing the change of rates violated the TILA, as it disclosed a rate not permitted under the agreement. **Id. at 1302-03.**

In **Rossman v. Fleet Bank 280 F.3d 384 (3rd Cir. 2002),** Defendant Fleet Bank changed the operable credit agreement and imposed an annual fee, violating TILA by failing to disclose the fee later imposed. using the "change-in-terms" provision to justified the change in the annual fees.

The Court found that "Under the approach urged by Fleet, a credit issuer would be able to disclose any terms it wanted to, with no intention ultimately to offer those terms." "Fleet's approach would have the potential to render the solicitation disclosure requirements created by the 1988 amendments to the TILA entirely ineffectual. Misleading early

disclosures would serve no informative purpose and worse, the additional disclosure requirement mandated by congress for the purpose of encouraging informed consumer choices could be used for the purpose of deceiving consumers. "

The Court concluded that Fleet's proposed approach would permit the use of required disclosures intended to protect consumers from hidden costs to intentionally deceive customers as to the costs of credit. Neither the language of the TILA itself, nor Regulation Z or the official Staff Interpretations direct such a result. **Id. pa. 401.**

In the case at bar the Fifth Circuit found that "both agreements (Crestar and Fleet) contained "changes in terms" provisions that allowed Crestar and Fleet to modify the terms of Bosch's accounts at any time. Thus, under the express terms of the contract, they could raise Bosch's interest rates and late fee charges whenever they chose."

The court also concluded "The plain language of §229.6, however, does not provide an automatic right to terminate the agreement. It merely requires adequate disclosure of certain changes to the consumer." this dangerous conclusion of the fifth circuit is in contrast to congress's intent to protect the consumer and against the analysis of its meaning by both the ninth and third circuits. Unless this court intervene and render a correct interpretation of TILA, in relation to the meaning of "change in terms" the courts will not have a clear direction in their decisions. This unclear path will have a drastic affect on the rights of the cardholders.

The clear intent of Fleet to buy Crestar accounts was to take advantage of the interpretation of "change-in-Terms as it is understood by the fifth circuit and raised the rates on the day of purchase, enhancing their income by about $45,000,000. annually while at the same time causing that much of hardship on the cardholders.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

CONSTITUTIONAL PROVISIONS

Seventh Amendment, United States Constitution:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and not fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

STATUTORY PROVISIONS:

Chapter 127 of Truth-in-Lending-Act ("TILA"), 15 U.S.C. Section 1637(b):

(b) Statement required with each billing cycle. The creditor of any account under an open end consumer credit plan shall transmit to the obligor, for each billing cycle at the end of which there is an outstanding balance in that account or with respect to which a finance charge is imposed, a statement setting forth each of the following items, to the extent applicable:

1) The conditions under which a finance charge may be imposed.
2) The method of determining the balance upon which a finance charge will be imposed.

3) The method of determining the amount of the finance charge.

4) Where one or more periodic rates may be used to compute the finance charge each such rate, the range of balance to which it is applicable, and the corresponding nominal annual percentage rate.

Va.Code Ann. Section 6.1-330.63(A) (1999).

Notwithstanding any other provision of this chapter, any bank or savings institution may impose finance charges and other charges and fees at such rates and in such amounts and manner as may be agreed by the borrower under a contract for revolving credit or any plan which permits an obligor to avail himself of the credit so established.

R.I. GEN. LAWS Section 6-26-2(d)(1999).

(d) Notwithstanding anything to the contrary in this chapter or in any other provision of Rhode Island law...(2) the interest rate shall be as agreed upon between lender and debtor; and (3) the following fees shall be construed as interest: fees for late payment, cash advance fees, overlimit fees, returned check fees and annual membership fees.

STATEMENT OF THE CASE

The Petitioner, Yigal Bosch, opened a credit card account with Crestar Bank (hereinafter referred to as "Crestar"), a Virginia bank, on or about April 15, 1994. Crestar solicited the account by mailing an invitation to Bosch to open an account with it, and to entice the Petitioner to join Crestar's growing number of customers. Crestar offered very attractive terms – a ceiling interest rate of 14.9%, regardless of the prime rate. Upon accepting the offer, the Petitioner opened an account and received a Cardholder Agreement (hereinafter the "Agreement"). Among other things the written agreement specifically stated the following:

> Section F..... Your ANNUAL PERCENTAGE RATE MAY vary monthly. The rate will be effective on the first day of each month and is

> determined by adding 2.9% to the highest Prime rate as published in the Money Rates column of the Wall Street Journal on the 25th day of the previous month (or the next business day following the 25th). Your ANNUAL PERCENTAGE RATE has a rate floor of 8.9% **and a rate cap of 14.9%.** Increases or decreases in the ANNUAL PERCENTAGE RATE may result in an increase or decrease in the FINANCE CHARGE imposed on your account. This monthly periodic rate and the corresponding ANNUAL PERCENTAGE RATE in effect at this time are disclosed on the insert accompanying your Card and this Agreement.

(emphasis added).

The Agreement also allowed a fifteen day grace period before late charges were incurred and a late fee in the sum of $15.00. It also included under Section Q its rights to change the terms of the Agreement at any time, "To the extent permitted by applicable law." The Petitioner used the card for different purchases. Crestar followed the agreement, charging the Petitioner 8.9% on June 03, 1994 and up to 14.40% on November 03, 1998; in the four year period the rate did fluctuate but never above the guaranteed cap rate.

The Agreement also provided a "change in terms" clause which stated that:

We may change the terms of this Agreement at any time. To the extent permitted by applicable law, the new terms (including any Finance Charges or Fees) will at our option apply to the balance of your Account when the new terms become effective, and will apply to all purchases and cash advances made after that date. If notice of the new terms is required by law, we will send the notice to our address shown in our records.

On or about October 9, 1998, Fleet Bank and Fleet Credit Card Services (hereinafter referred to as "Fleet"), a Rhode Island bank, purchased the Petitioner's account from Crestar and immediately increased the interest rate to 22.99% and its

late fees to $29.00 and eliminated the grace period. (Crestar and Fleet are collectively hereinafter referred to as the "Banks"). As soon as the Petitioner received his first Fleet statement, he contacted the latter and requested that the Crestar's terms be imposed, but Fleet refused to do so. To further deteriorate the business relationship, Fleet threatened the Petitioner will an increased annual percentage rate to 26.99% in the event that he closed the account.

From October 1998 to September 5, 2000, the Petitioner did not use the account and paid off the credit card balance on September 5, 2000. Thus, on November 23, 1999, the Petitioner filed a suit against Crestar and Fleet at the United States District Court for the Southern District of Texas pursuant to 38 USC Sections 1331 & 1367 alleging the following counts: breach of contract, violation of Texas' Deceptive Trade Practices Act, breach of duty of good faith and fair dealing, unjust enrichment, violation of Truth in Lending Act ("TILA"), fraud, deceit, and attorneys' fees and costs. The undisputed fact was that since Fleet erroneously increased the Petitioner's interest rate from 14.40% to 22.90%, a significant change and high profit for Fleet since the debt on the day of purchase was $576,347,913, the Petitioner suffered irreparable damages. Moreover, the increase in late fee charges and the elimination of the grace period profited Fleet and damaged consumers. Moreover, the practiced coercion of penalizing the Petitioner for closing his account was unconscionable. The Petitioner supplied evidence that the account was paid in full.

The Banks filed a counterclaim alleging that the Petitioner ceased to make payments on the account and requested judgment against the Petitioner for breach of the Agreement with Fleet. The Petitioner denied the allegations and requested proof, and accused the banks of scheming to prevent him to pursue the lawsuit, of harassment by preventing him from paying the debt, of preventing him from receiving information about his account, of refusing to give him the outstanding balance on the account, of preventing him from paying the account's balance in full, of adding charges and penalty to the account, and of sending the account to an independent collection attorneys who advised

the Petitioner that they have no idea why his account was transferred to them. The Petitioner also claimed that the banks violated Section 127(b) of TILA (15 USC Section 1637(b)) by intentionally not mailing a statement of the outstanding balance.

The Banks filed a Motion for Summary Judgment asserting that the agreements between the Petitioner and Crestar and the Petitioner and Fleet expressly accorded the two banks the right to unilaterally change the terms of the Account, and therefore, no breach occurred. In addition, the Banks claimed that the increase in the finance charge and late fees by Fleet did not violate any applicable statues or regulation. The Banks alleged that since the Petitioner ceased making any payment on the balance of the credit card, he was in default of the Agreement, and thus, Fleet was entitled to judgment for any balance on the account.

On September 12, 2000, the Petitioner filed a motion to certify class action, claiming that others suffered similar damages against the Bank (the motion was denied on April 20, 2001).

On January 16, 2001 the Banks filed a Motion for Summary Judgment alleging that no genuine issue as to any material fact existed and moved to dismiss the class action certification.

On April 20, 2001, the District Court granted the Banks' Motion for Summary Judgment and dismissed the Petitioner's case. The Petitioner filed a Motion for a New Trial which was denied on May 10, 2001.

As a result, the Petitioner filed a Notice of Appeal to the United States Court of Appeals Fifth Circuit. On January 9, 2002, the Appeals Court affirmed the District Court's decision and awarded attorney's fees, sanctions and costs against the Petitioner, imposing a greater harm upon the Petitioner.

Therefore, the Petitioner files this Writ of Certiorari requesting that this Honorable Court grant writ and review the rights of consumers who have an enforceable credit card contract but due to unilateral unfair and deceptive trade practices by the banking industry suffer severe damages.

ARGUMENT

The Petitioner's case should have never been dismissed since the decision by the lower and the court of appeals conflicts with decisions of 2 other Federal courts of appeals on an important issue that could drastically effect millions of credit card holders in particular and the general economy as a whole. Petitioner was denied the opportunity to pursue his case before a jury. The Petitioner seeks relief from this Honorable Court since financial institutions are intentionally changing the terms of enforceable credit card contracts to benefit themselves and causing severe damage to the Petitioner and other credit card holders and society. The enforceability of the original credit card contract must be observed unless both parties agree to a change in the terms, or in the alternative allow time to Petitioner to refinance his debt.

The Petitioner's case should have never been dismissed due to the causes of action in his complaint as well as the extensive documentation proving the allegations. Drastic nature of dismissal with prejudice requires action to be used only in extreme situations where there is clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing. *GCIU Employer Retirement Fund v. Chicago Tribune Co.*, 8 F.3d 1195 (7th Cir. 1993). A dismissal deprived the Petitioner of his constitutional right to a jury trial and due process.

Due to the nature of the credit card industry and the impact that credit cards have upon the economy, this Honorable Court should address the issue of the validity of the original terms of a credit card contract once it is transferred to a subsequent financial institute. Public policy dictates that the consumer is seriously harmed by the pressures of the financial industry by unilaterally undermining the enforceability and terms of a credit card contract causing hardship on the consumer and a negative impact upon the economy.

I. THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS (HOUSTON) AND THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT ERRED IN DISMISSING THE PETITIONER'S COMPLAINT AND ALLOW SANCTIONS AGAINST HIM BY REFUSING THE PETITIONER HIS RIGHT OF A JURY TRIAL AND DUE PROCESS IN VIOLATION OF THE UNITED STATES CONSTITUTION ON THE ISSUE OF THE VALIDITY OF A CREDIT CARD HOLDER AGREEMENT WITH A SUBSEQUENT LENDER WHICH REFUSES TO ABIDE BY THE TERMS OF THE ORIGINAL AGREEMENT (CONTROLLED BY THE LAWS OF THE STATE OF VIRGINIA), BY INTRODUCING A NEW AGREEMENT, (CONTROLLED BT THE LAWS OF THE SATE OF RHODE ISLAND) INCREASING THE INTEREST RATE AND THE LATE CHARGES, AND CAUSING SERIOUS HARM TO THE PETITIONER AND TO THE PUBLIC.

A dismissal ought not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v Gibson*, 355 U.S. 41, 46 (1957). Dismissal with prejudice is a harsh sanction to be resorted to only in extreme cases and is within the court's sound discretion; court must give full regard for severity of the sanction, granting dismissal sparingly and only when less drastic alternatives have been explored. *Jones v. Smith*, 99 F.R.D. 4 (1983). Courts may not dismiss complaint for insufficiency unless it clearly appears that by no stretch of the imagination is plaintiff entitled to any relief for claims asserted in his complaint. *Kozlowski v. Ferrarra*, 117 F.Supp. 650 (1954). The Petitioner must be given the opportunity to present his case before the jury – no jury has had the opportunity to weigh the evidence of his allegations. The Petitioner's claims are salient since the impact of the credit card industry as well as consumer debt are inter-related. The Petitioner, like the majority of Americans, have credit cards and revolving lines of credit. If the financial institutions unilaterally control the terms of the agreement and prevent or punish the consumer from

enforcing agreements regarding the terms of the credit, the negative impact on the economy and commerce will be unpredictably harsh.

A. Applicable state laws provide the Petitioner with the opportunity to agree to the terms of the revolving credit line.

A complaint is not subject to dismissal unless it appears to certainty that a plaintiff cannot possibly be entitled to relief under any set of facts which could be proved in support of its allegations. *Pointer v. American Oil Co.*, 295 F.Supp.573 (1968). In its analysis the Fifth Circuit compared the laws controlling the financial institutions. Virginia law that controlled the Crestar Agreement, provided that:

> Notwithstanding any other provision of this chapter, any bank or savings institution may impose finance charges and other charges and fees at such rates and in such amounts and manner **as may be agreed by the borrower under a contract** for revolving credit or any plan which permits an obligor to avail himself of the credit so established.

Va.Code Ann. Section 6.1-330.63(A). (emphasis added).

Rhode Island law, which controlled the Fleet Agreement, states in part that:

> (d) Notwithstanding anything to the contrary in this chapter or in any other provision of Rhode Island law...(2) the interest rate **shall be as agreed upon between lender and debtor**; and (3) the following fees shall be construed as interest: fees for late payment, cash advance fees, over limit fees, returned check fees and annual membership fees.

R.I. GEN. LAWS Section 6-26-2(d). (emphasis added).

The District Court and the Fifth Circuit failed to recognize that the applicable statutes state that the terms need to be agreed upon by the borrower. The Petitioner

never agreed with the terms of the Fleet credit card – and when he protested the terms, Fleet threatened to penalize him for closing the account. The Petitioner respects that the interest rate can fluctuate – however, the rate cap and late fee penalty agreed upon must have been enforced.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a ...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.* The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury. Under the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquiries into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute if fairly possible by which the constitutional question may be avoided; if there is no statue then it is a constitutional question. *City of Monterey v. DelMonte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999). Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the

particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. *Id*; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995). The Petitioner's case must fall to the jury in order to preserve his substantive right of the opportunity to be heard.

The lower courts intentionally failed to follow the words of the applicable state statutes. The jury should be given the opportunity to determine whether the Banks failed to comply with the state statutes – a factual determination.

B. **Being a consumer the Petitioner was entitled to rights under state and federal laws and was entitled to due process under the laws.**

Furthermore, the Appeals Court erred in discharging the Petitioner as a consumer. Under Texas law, a "consumer" is someone who seeks to purchase or lease good or services. Tex.Bus.& Co.Code Ann. Section 17.45(4)(Vernon 1987 & Supp. 1999); *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 815 (Tex. 1997). In order to hold a creditor liable in a consumer credit transaction, the creditor must be shown to have some direct connection with either the actual sales transaction or with a deceptive act related to financing the sale. *See Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134, 136 (Tex. 1987). Obviously, if it was not for the attractive credit card program offered to the Petitioner by Crestar, he would not have incurred almost $6,000.00 in debt. Once the debt became a large sum of money, Crestar sold the credit line for a substantial price to Fleet, who in return, wrongfully changed the terms of the repayment of debt. Since the Petitioner is a consumer, then he may maintain a cause of action for unfair and deceptive trade practices. Moreover, the state has a special interest in protecting its residents from financial institutions that unilaterally and deceptively change the terms of credit cards agreements because if there is no protection for the consumer, then the number of bankruptcies will surge. The Banks had a superior position over the Petitioner which it abused and pursuant to Texas Law there is a special relationship between the Petitioner and the Banks and since the Banks abused its position, they are

liable for a breach of duty of good faith and fair dealing. *See Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987).

Moreover, the Due Process Clause of the Fourteenth Amendment requires that a state prior to taking an action affecting an interest in property, provide notice that is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of that action. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Supreme Court's Construction of Due Process: 77 L.Ed.2d. 1485 (1999). In *Mullane*, the Supreme Court stated that the fundamental right protected by the due process clause is the right to adequate notice and an opportunity to be heard before any state action depriving one of life, liberty or property is accorded finality. The courts failed to protect the Petitioner's property – his money — from being wrongfully taken from him.

The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower courts misapplied those basic constitutional concepts – the Petitioner was not given a reasonable opportunity to present his case from an arbitrary or unjust appropriation. More importantly, the Petitioner's claims not only affected him but hundreds of thousands of people in the United States whose terms of revolving credit are unilaterally changed and salient terms of the original contract are breached.

It is clear from the facts stated above, that the Petitioner's constitutional rights were violated since he was not given the opportunity to present his case before a trier of fact. Consumer protection is a traditional and important component of the police power of the states. *Griffith v. Connecticut*, 218 U.S. 563, 568-69 (1910); *California v. ARC American Corp.*, 490 U.S. 93, 101 (1989). Typical areas of state consumer credit regulation include requirements of truthful advertising, restrictions or prohibitions on automatic wage assignments or authorizations to confess judgment, limitations on security interests and restrictions on debt

collection charges and practices; *Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980). The Truth-in-Lending Act, 15 USC Section 1601, et. seq. is enforced strictly against creditors and construed liberally in favor of the consumer. *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475, 477 (5th Cir. 1995). Any creditor who fails to comply with any requirement imposed under TILA with respect to any person is liable to such person in an amount equal to the sum of (1) any actual damage sustained by such person as a result of the failure; (2) statutory penalties; (3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission. *Dillard Dep't Stores, Inc. v. Owens*, 951 S.W.2d 915 (1997). Congress designed TILA to aid the unsophisticated consumer so that he would not be easily misled as to the total costs of financing so that there is a balance of scales thought to be weighed in favor of lenders in favor of borrowers. *Thomka v. A.Z. Chevrolet, Inc.*, 619 F.2d 246, 248 (3rd Cir. 1980); *Bizier v. Globe Financial Services, Inc.*, 654 F.2d 1, 3 (1st Cir. 1981). Thus, TILA ensures a meaningful disclosure of credit terms to enable consumers to compare readily the various credit terms available in the marketplace. *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142, 1144 (11th Cir. 1994).

C. **Due to the impact of the credit card upon commerce and the economy, this Honorable Court must grant this writ and reconcile the financial institutions over-reaching power with the consumers' notice protection and enforceability of contracts.**

"Because credit has become a way of life for consumers, and their need for protection in that area is great, the most important protective efforts in the field of consumer protection in recent years relate to consumer credit protection." 17 Am.Jur.2d, Consumer and Borrower Protection Section 1 (1990). Since the Banks failed to comply with their duties under TILA and the expressed terms of the contractual language under the Agreement, the Petitioner had a contractual and special relationship with the Banks. Since the Banks failed to comply with the contractual

terms, then the Banks breached their duty of good faith and fair dealing with the Petitioner. *Childers v. Pumping Sys., Inc.*, 968 F.2d 565, 568 (5th Cir. 1992).

More than 6,000 banks and other financial institutions in the United States provide credit card services to consumers. *See SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 960, 967 n. 11 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 2600 (1995). If an issuing bank desires unilaterally to change the terms of a bank credit card arrangement, by instituting a rate increase, for example, it must give to the consumer at least two written notices in advance of the change, and the first notice must be given at least three months before the effective date of the change. Credit Card Issuer's Liability, 53 A.L.R.4th 231 (2001). If the financial banks fail to comply with notice and TILA requirements, then unfair and deceptive trade practices and double and treble damages may be awarded. *See Young v. Bank of America*, 141 Cal.App.3d 108, 190 Cal.Rptr 122 (1983); *Garland v. Mobil Oil Corp.*, 340 F.Supp. 1095 (1972).

Fleet and Crestar failed to properly notify the Petitioner and give him the option to accept or reject to the new terms of the Agreement. Obviously, given the higher interest rate, the higher late penalty fee, and the fine to close the account, the Petitioner's due process rights were violated. The Petitioner's case is distinguished from those relied upon by the Banks, because the Petitioner was never given notice and the option to accept or reject the terms. *See Grasso v. USA Bank*, 713 A.2d 404 (Del.Sup. 1998); *Fineman v. Citicorp USA, Inc.*, 137 Ill.App.3d 1035 (1985); *Peterson v. Wells Fargo Bank*, 556 F.Supp. 1100 (1981).

The Petitioner, on his own behalf and on behalf of society, is pleading with this Honorable Court to review the lower court's decisions. Financial institutions should not be allowed to control the terms of credit card agreements and transfer their assets to another institution at the deprivation of the consumer without notice and without the opportunity to seek alternative credit. States must enforce, regulate and protect their residents' property.

CONCLUSION

The United States Court of Appeals Fifth Circuit and the United States District Court in Southern Texas erred in their interpretation of the change-in terms clause of Petitioner Agreement, their interpration is in a direct conflict with the interpretation of the same term by the 9th and 3rd Circuit. The United Sate Court of Appeals Fifth Circuit and the United States District Court in Southern Texas also erred in failing to protect the Petitioner's due process rights. The Petitioner pursues his case on his own behalf and all credit card holders. By allowing financial institutions to sell their interests to other institutions without notice and allowing them sweeping changes of the original contract terms is in contrast to Congress's intent in writing TILA and also an abuse of the consumers' due process rights.

The Court should grant *certiorari* to review this important matter to prevent different interpretations of TILA and its intent. This Honorable court should order that the Petitioner has a constitutional right to pursue his allegations before a trier of fact.

Respectfully submitted,

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No. 01-20533

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

YIGAL BOSCH, on behalf of himself
and others similarly situated,
Plaintiff-Counter Defendant-Appellant,

v.

CRESTAR BANK, and its successor in interest FLEET BANK
and FLEET CREDIT CARD SERVICES, L.P.,
Defendants-Counter Claimants-Appellees.

January 9, 2002

Appeal from the United States District Court
For the Southern District of Texas
H-99-CV-4071

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges. PER CURIAM:*

Yigal Bosch ("Bosch") appeals the district court's decision granting Crestar Bank's ("Crestar"), Fleet Bank's and Fleet Credit Card Services's (collectively, "Fleet") summary judgment motion. Bosch filed this suit in federal court pursuant to 28 U.S.C. § 1331 and § 1367, challenging changes to his credit card agreement both before and after the transfer of his account from Crestar to fleet. These changes resulted in higher rates and late fees, which Bosch contends breached the terms of his cardholder agreements. He also argues that because Crestar and Fleet did not have the right to amend the terms of his cardholder agreement, the changes violated the Texas Deceptive Trade Practices Act (DTPA), breached the implied duty of good faith and fair dealing in the contract, violated the Truth in Lending Act (TILA), resulted in unjust enrichment, and were fraudulent. Bosch also sought to certify a class action on these claims. We hold that the

district court correctly granted Fleet's motion for summary judgment on all of Bosch's claims, in addition, we GRANT Fleet's motion for sanctions against Bosch for filing a frivolous appeal and REMAND to the district court for the determination of costs, expenses, and attorneys' fees.

II.

Bosch opened a credit card account with Crestar in May 1994. Under the terms of the original cardholder agreement, the annual percentage rate (APR) was set at the prime rate plus 2.9%. The interest rate was collared, with a rate floor of 8.9% and a cap of 14.9%. In addition, the Crestar agreement provided for a late payment fee of$ 15.00. The cardholder agreement contained a "change in terms" clause, which permitted Crestar to modify the cardholder agreement at any time. Crestar also agreed to notify the cardholder of such changes if required to do so by law.[1] In August 1996, Crestar mailed Bosch a change in terms notice, alerting him to an increase in the variable prime rate to the prime rate plus 5.9%. The changes also eliminated the rate collar and increased the late payment fee to $20.00.

In July 1998, Fleet acquired Bosch's account from Crestar. Fleet subsequently mailed Bosch a new cardholder agreement that replaced the Crestar cardholder agreement in its entirety. This new agreement contained an equivalent "change in terms" provision. Fleet again increased the contact's APR to the higher oft 8.9% or the London Interbank Offered Rate plus 13.27%. Fleet also increased the late payment fee to $29.00. in May 1999, Fleet mailed Bosch a second change in terms notice, again increasing Bosch's variable rate.

After Fleet's second rate change, Bosch filed suit against Crestar and Fleet. He asserted that they did not have the right to amend the terms of the cardholder agreement. The district court rejected his claims and granted the Appellees' motion for summary judgment.

III.

On appeal, Bosch contends that the district court erred in granting the Appellees' motion for summary judgment. We review the district court's grant of a motion for summary judgment de novo. Conoco, Inc. v. Medic Sys., Inc., 259 P.34 369, 370 (5th Cir. 2001). in doing so, we apply the same standards applicable in the district court. Id. Rule 56 of the Federal Rules of Civil Procedure permits the entry of summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether there is a genuine material issue of law or fact, the evidence must be viewed in the light most favorable to the nonnovant and all factual inferences must be made in the nonmovant's favor. Behrens v. Pellet in, 516 U.s. 299, 309 (1996). We will apply this deferential standard to each of Bosch's causes of action raised in this appeal.

Bosch first contends that the increases in his interest rate and late fees breached the specific terms of his credit agreements with Crestar and fleet. The district court concluded that Crests and Fleet could impose whatever charges and fees they chose so long at they were pursuant to the terms of the cardholder agreement. See VA. CODE Ann. § 6.1-330.63(A) (Michie 1999);[2] R.I. GEN. LAWS § 6-26-2(d) (1999).[3] The district court found that both agreements contained "change in terms" provisions that allowed Crestar and Fleet to modify the terms of Bosch's accounts at anytime. Thus, under the express terms of the contract, they could raise Bosch's interest rates and late fee charges whenever they chase. Bosch has not presented any arguments on appeal that suggest that we should disturb the district court's findings.

Bosch next maintains that his contractual modifications violated the DTPA. Crestar and Fleet contend that Bosch is not a "consumer" is defined by the DTPA and therefore cannot bring suit under that act. Section 17.50 of the DTPA

provides that only a "consumer" may maintain a cause of action if aggrieved by deceptive practices. See TEX. BUS. & COM. CODE Ann. § 17.50(A) (Vernon 1987 & Supp. 1999). A "consumer" is someone who seeks to purchase or lease goods or services. Sec Tex. Bus. & COM. CODE Ann. § 17.45(4) (Vernon 1987 & Supp.1999); Arthur Andersen & Co. v. Perry Equip. Cop, 9.45 S.W.2d 812, 815 (Tex. 1997). The Texas Supreme Court has held that the definition of the terms "goods" or "services" does not include the extension of credit except where it is incident to the sale of goods or services and the conduct of the party extending the credit is intertwined In the transaction. E.g., Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169,174-75 (Tex. 1980). In order to hold a creditor liable in a consumer credit transaction, therefore, the creditor must be shown to have some direct connection with either the actual sales transaction or with a deceptive act related to financing the sale. See Home Sav. Ass'n v. Guerra, 733 S.W.2d 134, 136 (Tex. 1987).

Here, Bosch asserts that Crestar and Fleet committed deceptive acts in connection with the extension of credit. Bosch does not, however, provide any evidence that these extensions of credit were incident to any direct sales from Crestar, Fleet, or from pasties with whom they were intertwined. Thus, the district court correctly found that Bosch is not a "consumer" under the DTPA and not entitled to bring suit under that act.

Bosch next argues that the district court erred In granting summary judgment on his duty of good faith and fair dealing claims. The breach of duty of good faith and fair dealing, while related to contract law, is a tort claim and therefore governed by Texas law. Viles v. Security Nat'l Ins. Co., 788 S.W.2d 566,567 (Tex. 1990) ("We hold that a breach of the duty of good faith and fair dealing will give rise to a cause of action in tort that Is separate from any cause of action for breach of the underlying insurance contract."). The duty of good faith and fair dealing does not apply to all contracts. Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591,595 n. 5 (Tex. 1992). Instead, the duty arises only by express contractual language or when there is a special

relationship between the parties. Childers v. Pumping Sys., Inc., 968 F.2d 565, 568 (5th Cir. 1992).

The district court found that there was no express language in the cardholder agreement creating such a duty and that no special relationship existed between the parties. Bosch argues that the special relationship arises from the parties' unequal bargaining positions. The Texas Supreme Court, however, has held that there is no general duty of good faith and fair dealing in ordinary, arms-length commercial transactions. Formosa Plastics Corp. v. Presido Engineers & Contractors, Inc.. 960 S.W.2d 42, 51 (Tex. 1998). It has also concluded that the mere relationship of debtor and creditor is not sufficiently special to impose a duty of good faith upon its parties, FDIC v. Coleman, 795 S.W.2d 706, 708-709 (Tex. 1990). Here, Bosch has only alleged that he entered into an ordinary credit agreement. He provides no other evidence supporting the existence of a special relationship between himself and the Appellees. Therefore, he has failed to make out a claim for breach of the duty of good faith and fair dealing under Texas law

Bosch also contends that the district court erred in granting summary judgment on his unjust enrichment claim. The existence of a valid contract between the parties to a dispute bars relief on a theory of unjust enrichment. E.g. Bank One, Texas, NA. v. FDIC, 16 F. Supp.2d 698,714 (ND. Tex. 1998). Here, Bosch's claim is covered by the cardholder agreement, so the doctrine of unjust enrichment does not apply. Even if it did, the district court found correctly that Bosch has pressed no evidence other than mere allegations that either Crestar or Fleet obtained a benefit from him through fraud, duress, or some other unjust advantage.

In addition, Bosch argues that Crestar and Fleet did not provide adequate disclosure of the rate and fee increases in violation of the TILA. Specifically, Bosch asserts that Crestar and Fleet violated the requirements of "Regulation Z," which implements the TILA. 12 C.F.R. § 226.1, et seq. (1999). Regulation Z requires banks and credit card issuers to

disclose certain terms and costs to consumers. The regulation provides a specific notification procedure when creditors seek to amend certain terms of cardholder agreements, including finance charges and late fees. See 12 C.F.R. § 226.9(c)(1).

In the present case, the district court found that there was no deviation from prescribed disclosure language, no lack of explanation, and no ambiguity in the identification of the proposed changes to the agreement. Fleet and Crestar provided all the information required by law to be contained in a notice of a change of finance rates and fees. Bosch does not contest that Fleet and Crestar disclosures were adequate. Instead, he alleges that "Regulation Z" requires that a credit cardholder be afforded an opportunity to terminate the agreement after providing notice of such a change in rates. The plain language of § 229.6, however, does not provide an automatic right to terminate the agreement. It merely requires adequate disclosure of certain changes to the consumer. Bosch has provided no evidence or case-law in support of his arguments beyond his own erroneous interpretations of the statute and regulations. He has, therefore, failed to demonstrate a genuine issue of material fact or law on this issue.

Lastly, Bosch states that the district court erred in granting Crestar's and Meet's summary judgment motion on his fraud claim. Bosch asserts that Crestar committed fraud by concealing its intention to sell its accounts to Fleet. Bosch, however, has presented no specific evidence in support of this claim. Generalized, nonspecific allegations, perceptions, and beliefs are insufficient to state a valid claim of fraud In the making of a contract. Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1305 (5th Cir. 1983). The district court, therefore, correctly concluded that summary judgment was appropriate.

IV.

In response to this appeal, Crestar and Fleet filed a motion for damages and double costs against Bosch. Under Federal Rule of Appellate Procedure 38, we are authorized to award "just damages and single or double costs to the appellee" at our discretion. Fed. R. App. F. 38. Claims or defenses which are arguably supported by existing law, or any reasonably based suggestion for its extension, modification, or reversal are not frivolous, although they may be unsuccessful and indeed maybe summarily rejected. S. Leasing Partners. Ltd. v. McMullan, 801 F.2d 783,789 (5th Cir. 1986), overruled on other grounds by Thomas v. Capital Sec. Saw., Inc. 836 F.2d 866, 874 (5th Cir. 198 8)(en banc.) Despite this permissive standard, certain appeals transcend a poor legal position and serve only to harass others and clog the judicial system. We deem these appeals to be frivolous and therefore worthy of sanctions when "the result is obvious [because] the arguments of error are wholly without merit." Coghlan v. Starkey, 852 F.2d 806, 811. (5th Cir. 1 988)(per curiam). While we apply a more lenient standard to pro se appellants such as Bosch, pro se filings do not offer an impenetrable shield from sanctions. Farguson v. MBANK Houston, N.A., 808 F.2d 358, 359 (5th Cir. 1986).

Here, Bosch's claims appeared to lack any real basis in the law. Moreover, Bosch has repeatedly failed to offer any sort of factual support for his legal arguments beyond conclusory statements and bare allegations. At trial, Bosch was represented at all times by legal counsel. After the district court clearly addressed each of his arguments and properly deemed them to be without merit, his counsel declined to file an appeal. Bosch then filed this appeal pro *se*, presenting no new or valid legal arguments. Bosch, a sophisticated plaintiff with net assets worth over eighteen million dollars, subsequently rejected warnings from Crestar and Fleet that they would seek sanctions if he pursued his appeal.

The result of Bosch's appeal was obvious before it was filed. Having proceeded in the face of clear warnings, apparently

against the advice of his own counsel, and without proffering any evidence to support his summary judgment motion, he is subject to Rule 38 sanctions. We have the power under this rule to award both attorneys' fees and single or double costs. Because Bosch has proceeded *pro* se and because his complaint does not reveal an attempt to harass the Appellees, double costs appear to be too harsh of a remedy. Therefore, we only assess single costs against him. We also GRANT Appellees' request for attorneys fees.

For the above-mentioned reasons, the decision of the district court is AFFIRMED. We REMAND this matter to the district court for a determination of the amount of such expenses, fees and costs. The district court may also award such other relief that, in its discretion, it deems just and equitable.

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

[1] The "change in terms" clause provides:

> We may change the terms of this Agreement at any time. To the extent permitted by applicable law, the new terms (including any Finance Charges or Fees) will at our option apply to the balance of your Account when the new terms become effective, and will apply to all purchases and cash advances made after that date. If notice of the new terms is required by law, we will send the notice to your address shown in our records.

[2] Virginia law controls the Crestar agreement VA. CODE ANN. § 6.1-330.63(A) provides:

> Notwithstanding any other provision of this chapter, any bank or savings institution may impose finance charges and other charges and fees at such rates and in such amounts and manner as may be agreed by the borrower under a contract for revolving credit or any plan which permits an obligor to avail himself of the credit so established.

[3] Rhode Island law controls the Fleet agreement. R.I. Gen. Laws § 6.26-2(d) provides, in relevant part:

> (d) Notwithstanding anything to the contrary in this chapter or in any other provision of Rhode Island law.. . (2) the interest rate shall be as agreed upon between lender and debtor; and (3) the following fees shall be construed as interest: fees for late payment, cash advance fees, overlimit fees, returned check fees and annual membership fees.

Civil Action # H-99-4071

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

YIGAL BOSCH, on behalf of himself and others similarly situated,
Plaintiff,

v.

CRESTAR BANK, and its successor in interest FLEET BANK and FLEET CREDIT CARD SERVICES, L.P.,
Defendants.

April 23, 2001

ORDER

Pending before the Court are Defendants' Motion for Summary Judgment (Document #14), Defendants' Motion to Strike Plaintiff's Summary Judgment Evidence (Document #22), and Defendants' Motion for Summary Judgment (Document #39). Having considered the motions, submissions, and applicable law, the Court determines that the motions should be granted.

I. INTRODUCTION

Plaintiff Yigal Bosch ("Bosch") filed the instant suit against Defendants Crestar Dank ("Crestar"), Fleet Bank and Fleet Credit Card Services, L.P. ("Fleet") (collectively, "Defendants"). Bosch's suit arises out of his credit card account that was initially issued by Crestar and was later transferred to Fleet. After Fleet took over Bosch's account, it increased the account's interest rate and late payment fee. These increased interest rates and late payment fees are the subject of Bosch's complaint.

II. FACTUAL BACKGROUND

Bosch opened a credit card account with Crestar in May 1994. Under the cardholder agreement governing the account, the annual percentage rate ("APR") was a variable rate of prime rate plus 2.9%, with a rate floor of 8.9% and a rate cap of 14.9%. The account also provided for a late payment fee of$15.00. The cardholder agreement contained a "change in terms" provision that allowed Crestar to change the terms of its agreement at any times The agreement also stated that if notice of the new terms was required by law, Crestar would send a change in terms notice to the customer's address as shown in their records. In August 1996, Crestar mailed Bosch a change in terms notice that identified several changes to Bosch's cardholder agreement. Crcstar increased the APR to a variable rate of prime rate plus 5.9% eliminating the rate floor and cap. Crestar also increased the late payment fee to $20.00.

In July 1998, Fleet acquired several Crestar accounts, including Bosch's account On September 25, 1998, Fleet mailed Bosch a cardholder agreement that replaced the Crestar cardholder agreement in its entirety. The new agreement contained a "change in terms" provision like the Crestar agreement. With the new agreement, Fleet increased the account APR to a variable rate equal to the higher of 18.9% or the London Interbank Offered Rate plus 13.27%. Fleet also increased the late payment fee to $29.00. On May 10, 1999, Fleet mailed Bosch another change in terms notice. The notice stated that Bosch's account APR was being increased to a variable rate equal to the higher of 17.27% plus 5.76% or the London Interhank Offered Rate plus 17.27%.

Bosch thereafter brought suit against Defendants, asserting that they did not have the right to amend the terms of his cardholder agreement. Bosch asserts numerous causes of action against Defendants, including (1) breach of the credit card agreement, (2) violation of the Texas Deceptive Trade Practices Act ("DTPA"), (3) breach of the duty of good faith and fair dealing, (4) violation of the Truth in Lending Act

("TWA"), (5) unjust enrichment, and (6) fraud. Bosch also seeks to certify a class action in this matter. Defendants now move for summary judgment on all of Bosch's claims.

Furthermore, Defendants move to strike several portions of Bosch's affidavit, attached to the response to Defendants' first motion for summary judgment. Bosch never responded to the motion to strike. The motion is thus deemed unopposed. See S.D. Tex. LOCAL R. 7.4. The Court therefore grants Defendants' motion to strike the portions of Bosch's affidavit as identified in their motion and will not consider those statements in ruling on the motion for summary judgment infra.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's ease, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Initially, the movant bears the burden of demonstrating to the court that there is an absence of a genuine issue of any material fact. Id. at 323. The burden then shifts to the party who bears the burden of proof on the claims on which summary judgment is sought to present evidence beyond the pleadings to show there is a genuine issue for trial. Id. at 324. A genuine issue for trial exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). Conclusory allegations unsupported by specific facts will not prevent an award of summary judgment; the plaintiff cannot rest on his allegations to get to a jury without any significant probative evidence tending to support the complaint. E.g., Nat'l Ass 'n of Guy 't Employees v City Pub. Serv. Bd., 40 F.3d 698, 713 (5th Cir.1994).

IV. DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Defendants filed two summary judgment motions, arguing that Bosch has no evidence on any of his causes of action. The first motion deals mainly with the alleged breach of the cardholder agreement. The second motion deals with the cardholder agreement as well as Bosch's other five claims. The Court will address Bosch's causes of action in turn.

A. Cardholder Agreement

Defendants contend that they are entitled to summary judgment on Bosch's first cause of action because the controlling documents are the cardholder agreements, and these agreements expressly gave Defendants the right to change the terms of Bosch's account at anytime. Virginia law (as to the Crestar Agreement) and Rhode Island law (as to the Fleet Agreement) govern the cardholder agreements. Both states' applicable laws provide that banks and issuers of credit cards may impose charges and other fees pursuant to the terms of the cardholder agreement. See R. I. Gen. LAWS § 6-26-2(d) (1999): VA. CODE ANN. § 6.1-330.63(A) (Michie 1999). Here, both the Crestar and Fleet cardholder agreements contained "change in terms" provisions that allowed Crestar and Fleet to modify the terms of Bosch's accounts at any time, which they elected to do.

In response to the first motion for summary judgment, Bosch points to portions of the Crestar agreement describing the Crestar interest rate and late payment fee terms. fn1 Bosch then concludes, without explanation, that Fleet and Crestar breached this agreement by increasing the interest rate and late payment fee and eliminating the late fee grace period. Bosch has failed to provide competent summary judgment evidence demonstrating a genuine issue of material fact on this issue.

The parties also raise the matter of adequate disclosure to the credit card consumer. "Regulation Z,"

promulgated by the Federal Reserve Board, requires disclosures of terms and costs of credit card accounts by banks and credit card issuers. 12 C.F.R. § 226.1(b) (1999). The regulation also provides the procedure whereby creditors may amend the terms of cardholder agreements. Id. § 226.9(c)(1). This requires written notice to consumers whenever any term required to be disclosed is changed or the required minimum payment is increased. Id.

Defendants contend that Bosch cannot demonstrate that Defendants' notices (identifying the changes in terms) did not conform to the applicable regulations. Namely, Crestar mailed Bosch a change in terms notice in August 1996 informing him that his interest rates and late payment fees were being increased. Fleet subsequently mailed Bosch a change in terms notice advising him that his interest rates and late payment fees were again being increased. In response, Bosch argues that he was not allowed to object to the modification and that he was not given an opportunity to pay off his balance under the Crestar agreement. However, Bosch provided no competent summary judgment evidence, other than his own conclusory allegations, that would raise a genuine issue of material fact on this issue. Summary judgment is therefore appropriate on Bosch's cause of action for breach of the cardholder agreement.

B. DTPA

Defendants contend that Bosch is not a "consumer" as defined by the DTPA and is thus not entitled to bring suit. It is well settled that a plaintiff must demonstrate that he is a "consumer" to bring suit under the DIPA. E.g., Riverside National Rank v. Lewis, 603 S.W.2d 169, 173 (Tex. 1980). "Consumer" is defined by the DTPA as an individual who seeks or acquires by purchase or lease any goods or services. Tex. Bus. & Com. Code Ann. § 17.45(4) (Vernon 1999). However, the use of the term "goods and services" does not include the extension of credit. Riverside, 603 S.W.2d at 174-75.

Here, Bosch asserts that Defendants committed deceptive acts in connection with the extension of credit pursuant to his cardholder agreement. Bosch does not provide any competent summary judgment evidence raising a genuine issue of material fact as to his status as a DTPA "consumer." Bosch is thus not a "consumer" under the DTPA and he is not entitled to bring suit under these circumstances. See id. Summary judgment is therefore appropriate regarding Bosch's DTPA claim.

C. Duty of Good Faith and Fair Dealing

Defendants assert that Bosch's breach of the duty of good faith and fair dealing claim fails as a matter of law. The duty of good faith and fair dealing does not exist in every contract. Childers v. Pumping Sys., Inc., 968 F.2d 565, 568 (5th Cir. 1992) (applying Texas law). Rather, the duty arises only by express contractual language or when there is a special relationship between the contracting parties. Id.

In this case, Defendants contend that no contractual language gives rise to such a duty, and no special relationship exists that is sufficient to impose the duty of good faith and fair dealing upon Defendants. In response, Bosch argues that when the parties possess unequal bargaining positions, and one party can easily take advantage of the other, a special relationship exists that can support the duty of good faith and fair dealing. Other than identifying this proposition, which is insufficient to survive summary judgment, Bosch provides no competent summary judgment evidence to support his claim. Summary judgment is therefore appropriate regarding Bosch's claim for breach of the duty of good faith and fair dealing.

D. Unjust Enrichment

Defendants assert that Bosch's claim for unjust enrichment fails as a matter of law. When a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a theory of unjust

enrichment. E.g., Bank One, Texas, WA. v. Fed. Deposit Ins. Corp., 16 F.Supp.2d 698, 714 (N.D. Tex. 1998). Here, Defendants argue that Bosch's claim is covered by the cardholder agreements and that he is therefore not entitled to recovery under a theory of unjust enrichment. In response, Bosch argues that the exorbitant increases in interest rates and late fees establish that Defendants took an unfair advantage of cardholders and that such scheme sustains a cause of action for unjust enrichment. Bosch, however, provided the Court with no competent summary judgment evidence to support these conclusions. Summary judgment is therefore appropriate regarding Bosch's claim of unjust enrichment.

E. TILA

Defendants state that Bosch cannot support a claim under TILA because, first. he does not specify which TILA provision was allegedly violated and, second, Defendants followed TILA's implementing regulations. TILA requires creditors to disclose to consumers any finance charge that the consumer will bear under the credit transaction. 15 U.S.C. § 1638(a) (1994); see also 12 C.F.R. § 226.9(c)(1). As discussed supra, Defendants provided Bosch with notice of increases in applicable interest rates and late payment fees as required by Regulation Z. In response, Bosch points to no competent summary judgment evidence that raises a genuine issue of material fact on the TILA claim. Summary judgment is therefore appropriate regarding Bosch's TILA claim.

F. Fraud

Defendants argue that Bosch has no evidence of fraud. Under Texas law, fraud requires "a material representation, which was false, and which was either known to be false when made or was asserted without knowledge of its truth, which was intended to be acted upon, which was relied upon, and which caused injury." E.g., US. Quest Ltd. v. Kimmons, 228 F.3d 399, 403 (5th Cir. 2000). Defendants contend that the only allegation of fraud is that Fleet raised

the interest rate and late payment fees on Bosch's account, and that such allegation does not carry the plaintiffs burden on the requisite elements of a fraud claim. In response, Bosch argues that Crestar committed fraud by concealing its intention to sell its accounts to Fleet so that it could raise the interest rates. Again, Bosch's conclusions are insufficient to raise a fact issue on a motion for summary judgment. Summary judgment is therefore appropriate regarding Bosch's claim for fraud.

G. Attorneys' Fees

Finally, Defendants state that they are entitled to summary judgment on Bosch's claim for attorneys' fees because such a claim is not a separate cause of action. An award of attorneys' fees is recoverable only by contractual provision in the agreement or by statutory provision under the Texas Civil Practice and Remedies Code. See, e.g., Mabon Ltd. v. Afri-Carib Enters'., Inc., 29 S.W.2d 291, 301-02 (Tex. App.-Houston [14th Dist.] 2000, no pet.). Here, Bosch has not demonstrated that lie would be entitled to attorneys' fees under statute or contract. Furthermore, Bosch is not the prevailing party as discussed supra. Given the foregoing, the Court hereby

ORDERS that Defendants' Motion to Strike Plaintiffs Summary Judgment Evidence (Document #22) is GRANTED. The Court further

ORDERS that Defendants' Motion for Summary Judgment (Document #14) and Defendants' Motion for Summary Judgment (Document #39) are GRANTED. Plaintiff Yigal Bosch's claims against Defendants Crestar Bank, Fleet Bank, and Fleet Credit Card Services, L.P. for breach of the credit card agreement, violation of the Texas Deceptive Trade Practices Act, breach of the duty of good faith and fair dealing, violation of the Truth in Lending Act, unjust enrichment and fraud arc

DISMISSED.

SIGNED at Houston, Texas, on this 20 day of April, 2001.

DAVID HITTNER
United States District Judge

Footnotes

fn1 In response to the second motion for summary judgment, Bosch states: "Plaintiff rely [sic] on the pleading [sic] on file with this Court, as well as the evidence on file with this court together with Plaintiffs' Response to Defendants' first Motion for Summary Judgment. And all other exhibits by defendants and plaintiff filed with this Court." It is well settled that, to survive a no-evidence motion for summary judgment. the non-movant must come forth evidence beyond the pleadings to show there is a genuine issue for trial. E.g., FED. R. Civ. P. 56(c); Celotex, 477 U.S. at 324. Bosch therefore may not rely upon his pleadings to survive summary judgment; rather, he must provide competent summary judgment evidence that demonstrates that genuine issues of material fact exist.

No. 01-20533

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

YIGAL BOSCH, on behalf of himself
and others similarly situated,
Plaintiff-Counter Defendant-Appellant,

v.

CRESTAR BANK, and its successor in interest FLEET BANK
and FLEET CREDIT CARD SERVICES, L.P.,
Defendants-Counter Claimants-Appellees.

February 14, 2002

Appeal from the United States District Court for the Southern
District of Texas, Houston

ON PETITION FOR REHEARING

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR
THE COURT;

Civil Action # H-99-4071

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

YIGAL BOSCH, on behalf of himself and others similarly situated,
Plaintiff,

v.

CRESTAR BANK, and its successor in interest FLEET BANK and FLEET CREDIT CARD SERVICES, L.P.,
Defendants.

April 23, 2001

FINAL JUDGMENT

As the Court has granted Defendants' motions for summary judgment, the Court hereby

ORDERS that final judgment be entered in favor of Defendants. Plaintiff shall take nothing from Defendants. This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 20 day of April, 2001.

DAVID HITTNER
United States District Judge